

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ANTHONY and GLADYS FLEETWOOD,)	
Husband and Wife; WOLVERINE, INC.,)	
a Washington Corporation; and REX)	
and LUCINDA E. ROZMUS, Husband and)	NO. CV-09-00152-LRS
Wife,)	
)	
Plaintiff,)	ORDER DENYING PLAINTIFFS'
-vs-)	LIMITED MOTION FOR
)	RECONSIDERATION
STANLEY STEEMER INTERNATIONAL, an)	
Ohio Corporation,)	
)	
Defendant.)	
)	

BEFORE THE COURT is Plaintiffs ANTHONY and GLADYS FLEETWOOD, WOLVERINE, INC., and REX and LUCINDA E. ROZMUS'S ["Plaintiffs"] Limited Motion for Reconsideration, filed July 15, 2010 (Ct. Rec. 156), noted without oral argument. Defendant, STANLEY STEEMER INTERNATIONAL, responded in opposition to Plaintiffs' limited motion for reconsideration (Ct. Rec. 161) on July 26, 2010. Plaintiffs replied to Defendant's opposition (Ct. Rec. 162) on August 4, 2010.

Plaintiffs ask the court to reconsider the court's order on July 2, 2010 (Ct. Rec. 155), denying Plaintiff Rozmus' Motion for Partial Summary Judgment (Ct. Rec. 79), granting in part and reserving in part Defendant Stanley Steemer's Motion for Summary Judgment Regarding Rozmus Plaintiffs (Ct. Rec. 94), and granting in part and reserving in part Stanley

1 Steemer's Motion for Summary Judgment Regarding Fleetwood Plaintiffs (Ct.
2 Rec. 99).

3 DISCUSSION

4 Motions for reconsideration serve a limited function. Under the
5 Federal Rules of Civil Procedure, motions for reconsideration may be made
6 pursuant to Rule 59(e). Reconsideration may be appropriate if (1) newly
7 discovered evidence is presented, (2) the court committed clear error or
8 the initial decision was manifestly unjust, or (3) there is an
9 intervening change in controlling law. Sch. Dist. No. 1J v. ACandS,
10 Inc., 5 F.3d 1255, 1263 (9th Cir. 1993), cert. denied, 512 U.S. 1236, 114
11 S.Ct. 2742, 129 L.Ed.2d 861 (1994). A motion for reconsideration is not
12 appropriately brought to present arguments already considered by the
13 court. Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985).

14 Plaintiffs do not argue that there is new evidence or that there has
15 been a change of controlling law, but that reconsideration is necessary
16 to correct clear error committed by the court. (Ct. Rec. 157, at 3.)
17 Defendant Stanley Steemer responds in opposition that Plaintiffs' motion
18 for reconsideration should be denied because Plaintiffs have not cited
19 any clear error made by the court and that Plaintiffs are simply
20 rearguing points previously made or making points that could have been
21 made previously. (Ct. Rec. 161 at 8-9.)

22 Plaintiffs make two claims in their motion for reconsideration.
23 (Ct. Rec. 157 at 4, 7.) Plaintiffs' claims are limited in scope to a
24 single count from their respective complaints for which this court
25 previously granted partial summary judgment in favor of Defendant Stanley

1 Steemer.¹ (Ct. Rec. 155 at 27-30, 37.) Plaintiffs make two claims for
2 reconsideration. First, Plaintiffs contend that there was evidence
3 before the court when it considered Defendant's motion for summary
4 judgment that raises a question of material fact as to Stanley Steemer's
5 alleged breach of its duty of good faith and fair dealing in regard to
6 its contractual duty to provide advice, counseling and management
7 assistance. (Ct. Rec. 157 at 4.) Plaintiffs second claim is that as to
8 Rozmus, the court improperly made a factual determination that should
9 have been left to a jury with respect to Stanley Steemer's alleged breach
10 of its contractual duty to act in good faith by failing to act in a
11 timely manner upon Rozmus's application to transfer the Yakima territory
12 in 2007. (Ct. Rec. 157 at 7.)

13 **1. Duty to Provide Advice, Counseling and Management Assistance**

14 Plaintiffs claim that the court committed clear error by granting
15 summary judgment when Plaintiffs provided evidence that Stanley Steemer
16 gave unsound business advice, counseling and management assistance.
17 Plaintiffs argue that genuine issues of material fact preclude summary
18 judgment. (Ct. Rec. 157 at 4.)

19 In this court's order granting partial summary judgment in behalf
20 of Stanley Steemer, the court found that Plaintiffs were arguing that
21 Stanley Steemer had breached the common law principle of "good faith and
22 fair dealing" that is inherent in every business relationship, and
23 specifically with respect to Stanley Steemer's termination of the
24

25 ¹ "Breach of contract and of the implied covenant of good faith and
26 fair dealing that is implied in every contract relationship." (Pls. Am.
Compl., Ct. Rec. 7 at 23 ¶ 6.1.6.)

1 franchise agreements and Stanley Steemer's failure to process Rozmus's
2 Yakima area franchise right transfer application. (Ct. Rec. 155 at 27-
3 28.) The court found that Plaintiffs were arguing that Stanley Steemer
4 had breached its covenant of good faith and fair dealing by
5 "encourag[ing] Plaintiffs to incur greater debt to grow the business
6 volume while not being overly concerned about the load of debt being
7 incurred." (Id. at 29-30 (quotation marks omitted).) The court found
8 that no questions of material fact remained for resolution and denied
9 Plaintiffs' claim. (Id. at 30.)

10 Plaintiffs now argue in their motion for reconsideration that
11 Stanley Steemer has breeched its covenant of good faith and fair dealing
12 with respect to a specific provision of the franchise agreement which
13 states that "Stanley Steemer will furnish such additional advice,
14 counseling and management assistance as Franchise Owner shall reasonably
15 request." (Ct. Rec. 157 at 4; see Ct. Rec. 73-4 at 15 ¶ Article
16 VIII(M).) Plaintiffs argue that Stanley Steemer provided unsound business
17 advice, counseling and management assistance:

18 (a.) Stanley Steemer prepared and provided cash flow
19 projections and annual budgets to Plaintiffs, which Plaintiffs
20 relied upon in making financial decisions such as significantly
21 increasing their debt levels. These projections and budgets
22 required plaintiffs to spend significant amounts of money for
such things as advertising, marketing and purchase of
additional equipment and vehicles, with the singular purpose
of rapid expansion of the franchise market. (Ct. Rec. 122 at
¶¶ 6, 22; Ct. Rec. 126 at ¶ 8.)

23 (b.) Stanley Steemer consistently and repeatedly encouraged
24 Plaintiffs to rapidly grow their franchises at all costs. (Ct.
25 Rec. 122 at ¶¶ 10, 12, 15, 19; Ct. Rec. 126 at ¶¶ 11, 13.)
This is despite the fact that Stanley Steemer knew for a fact
26 that a franchisee experiencing such rapid growth was "out of
control" and "going to have problems." (Ct. Rec. 127-1 at 12.)

1 (c.) Stanley Steemer actively promoted and encouraged a
2 business model of initial debt financing and increasing debt
3 equity as a financially appropriate way for Plaintiffs to grow
4 their business and increase sales. (Ct. Rec. 122 at ¶¶ 10, 12,
15, 19; Ct. Rec. 126 at ¶¶ 11, 13.) Plaintiffs' experts have
opined that the business model promoted by Stanley Steemer is
financially unsound. (Ct. Rec. 127-1 at 29.)

5 (Ct. Rec. 157 at 5.) Plaintiffs claim that these assertions raise a
6 genuine issue of material fact as to whether Stanley Steemer provided
7 unsound business advice, counseling and management assistance and that
8 the court committed clear error by granting summary judgment. (Ct. Rec.
9 157 at 2, 4.) The court disagrees.

10 The court declines to find that there is any question of material
11 fact as to whether Stanley Steemer breached an implied covenant of good
12 faith and fair dealing specifically pertaining to the provision of the
13 franchise agreement which states that Stanley Steemer will provide
14 additional advice, counseling and management assistance requested by a
15 franchisee. This court previously found that Stanley Steemer had not
16 breached the covenant of good faith and fair dealing as to the entire
17 franchise agreement, (Ct. Rec. 155 at 30), which encompasses this clause
18 of the franchise agreement now relied upon by Plaintiffs.

19 Subheadings (a.) and (b.) simply restate arguments raised by
20 Plaintiffs in their opposition to Defendant's motion for summary
21 judgment. (See Ct. Rec. 119 at 4-6, 14-15.) The court previously
22 considered the same representations made by Plaintiffs counsel and
23 determined that such statements encouraging growth, if they had been
24 made, only represented a hope for the future of the franchises, and did
25 not establish a material question of fact in light of the inherently
26

1 speculative nature of the statements which were allegedly made. (See Ct.
2 Rec. 155 at 30.)

3 Under subheading (c.), Plaintiffs cite to their previously submitted
4 expert report to support their new argument that Plaintiff's expert
5 opinion raises a question of fact that Stanley Steemer provided unsound
6 business advice. (Ct. Rec. 157 at 5-6.) Plaintiffs have improperly
7 raised a new argument in their motion for reconsideration that could have
8 been raised in their opposition to Defendant's motion for summary
9 judgment, and therefore, the court will not grant their motion based on
10 this argument. See *Christie v. Iopa*, 176 F.3d 1231, 1239 n.5 (9th Cir.
11 1999); see also *Novato Fire Protection Dist. v. United States*, 181 F.3d
12 1135, 1142 n.6 (9th Cir. 1999). Further, even if the court were to
13 consider this argument on reconsideration, the court would find the same
14 argument to be without merit. Plaintiffs were free to seek financial and
15 business advice regarding their franchise agreements and business
16 dealings with Stanley Steemer. Plaintiffs, in their respective Franchise
17 Agreements with Stanley Steemer, Article XVI, subparagraph (C.),
18 stipulate to having been accorded ample opportunity to consult with
19 advisors of their own choosing:

20 C. CONSULTATION. FRANCHISE OWNER STATES THAT HE OR SHE HAS
21 RECEIVED, READ AND UNDERSTOOD THIS AGREEMENT, AND HAS BEEN
22 ACCORDED AN AMPLE OPPORTUNITY AND A PERIOD OF NOT LESS THAN
23 FIVE (5) BUSINESS DAYS AFTER RECEIPT OF A FINAL COPY OF THIS
24 AGREEMENT TO CONSULT WITH ADVISORS OR HIS OR HER OWN CHOOSING
25 CONCERNING THE POTENTIAL BENEFITS AND RISKS THAT MAY BE
26 INVOLVED IN ENTERING INTO THIS AGREEMENT AND BECOMING A STANLEY
STEEMER FRANCHISE OWNER.

(Ct. Rec. 73-3 at 15; Ct. Rec. 73-4 at 22.) Additionally, this court
found that the implied obligation of good faith and fair dealing is

1 designed to protect the reasonable expectations of the parties to a
2 contract. (Ct. Rec. 155 at 29.) The parties specifically stipulated in
3 their Franchise Agreements in Article XVI that Stanley Steemer made no
4 guarantee as to the success of the Plaintiffs' franchise business
5 ventures:

6 D. DISCLAIMER. FRANCHISE OWNER ACKNOWLEDGES THAT STANLEY
7 STEEMER HAS MADE NO WARRANTY OR GUARANTEE, EXPRESS OR IMPLIED,
8 AS TO THE POTENTIAL INCOME, PROFIT OR SUCCESS OF THE BUSINESS
9 VENTURE CONTEMPLATED BY THIS AGREEMENT.

10 (Ct. Rec. 73-3 at 15; Ct. Rec. 73-4 at 22.) Therefore, the court
11 declines to find that there is a question of material fact of whether
12 Stanley Steemer provided unsound business advice merely because the
13 success of Plaintiffs' respective franchises did not meet Plaintiffs'
14 expectations, especially when Plaintiffs had ample opportunity and were
15 encouraged to receive consultation from advisors of their own choosing.

16 Plaintiffs also cite to an unpublished Fourth Circuit opinion from
17 1987 to support their claim that the issue of whether a franchiser has
18 breached a contract with a franchisee by failing to act in good faith or
19 deal fairly is a question of fact for the jury. (Ct. Rec. 157 at 6
20 (citing Fox v. Dynamark Sec. Ctrs., 885 F.2d 864, 1989 WL 106802 (4th
21 Cir. 1989 Sept. 1, 1989).) However, this authority is neither
22 controlling, nor does it represent an intervening change in law. The
23 court does not find it persuasive because it only addresses, inter alia,
24 whether there was sufficient evidence to sustain a jury verdict following
25 a trial on breach of contract and does not discuss summary judgment. See
26 Fox, 1989 WL 106802 at *3.

2. Transfer of Yakima Territory

1 In this court's order granting partial summary judgment in behalf
2 of Defendant Stanley Steemer, the court rejected Plaintiffs' claim that
3 Stanley Steemer had breached an implied covenant of good faith and fair
4 dealing with Rozmus, despite Plaintiffs' allegation that Stanley Steemer
5 failed to process Rozmus's Yakima-area franchise transfer application in
6 a timely basis. (Ct. Rec. 155 at 127.) The court reached its
7 conclusion based on two dispositive and undisputed facts: First, the
8 court found that on February 2, 2007, Rozmus was in default on his
9 payments, owing Stanley Steemer \$62,915.79, and thus had materially
10 breached the terms of the Franchise Agreement. (Id. at 17.) Rozmus's
11 failure to pay his obligations was designated a material breach, which
12 allowed Stanley Steemer to terminate the franchise. (Id. at 17, 27.)
13 On February 28, 2007, Rozmus and Stanley Steemer entered into a Franchise
14 Termination Agreement, a forbearance agreement that terminated the
15 original Franchise Agreement and required monthly installment payments
16 on a promissory note in the amount of the delinquent balance. (Ct. Rec.
17 155 at 18; Ct. Rec. 73-6 at 1-2.)

18 Secondly, the Franchise Termination Agreement expressly prohibited
19 Rozmus from selling his franchise rights if he was in default. (Ct. Rec.
20 155 at 28; .) The court found it was undisputed that Rozmus was in
21 default under the Franchise Termination Agreement at the time of his
22 alleged territory transfer application and that Stanley Steemer's failure
23 to process the application was based on Rozmus's default status. (Id.
24 at 27.) Based on these findings, the court concluded that Stanley
25 Steemer had not breached the implied covenant of good faith and fair
26 dealing concerning Rozmus, and specifically concerning Stanley Steemer's

1 alleged failure to process the territory transfer application on a timely
2 basis. (Id. at 30.)

3 Plaintiffs also dispute this court's finding that Rozmus was in
4 default of the Franchise Termination Agreement at the time of the alleged
5 territory transfer application in April 2007. (Ct. Rec. 157 at 9.)
6 Plaintiffs claim that Stanley Steemer failed to meet its evidentiary
7 burden to establish that Rozmus was in default of the Franchise
8 Termination Agreement in April, 2007. (Id.) Defendant counters
9 Plaintiffs' claim by referring the court to Defendant's (Ct. Rec. 96) and
10 Plaintiffs' (Ct. Rec. 120) statements of facts. (Ct. Rec. 161 at 7.) In
11 his answer to Defendant's counterclaim, Rozmus admitted to becoming
12 "increasingly delinquent in his payment obligations from March 2007
13 through April 2008." (Ct. Rec. 26 at 3 ¶ 2.13.) Defendant reasserted
14 this admonition in its statement of facts filed with its motion for
15 summary judgment. (Ct. Rec. 96 at 18.) Rozmus did not dispute this fact
16 in his statement of facts. (See Ct. Rec. 120 at 3-4.)

17 Per the Local Rules of the United States District Court for the
18 Eastern District of Washington, in determining a motion for summary
19 judgment, the court may assume the facts claimed by the moving party are
20 admitted to exist without controversy except as and to the extent that
21 such facts are controverted by the opposing party's responsive statement
22 of facts. Rule LR 56.1. Since Rozmus did not dispute that he was in
23 default of the Franchise Termination Agreement as early as March 2007,
24 and through April 2008, the court was correct in finding that Rozmus was
25 in default of the Franchise Termination Agreement at the time of the
26 alleged territory transfer application in April 2007. Therefore, there

1 is no genuine issue of material fact as to whether Rozmus was in default
2 of the Franchise Termination Agreement at the time of the alleged
3 territory transfer application.

4 Plaintiffs' second claim is that there is a genuine issue of
5 material fact as to whether Stanley Steemer failed to process the
6 transfer application based on Rozmus's default on the Franchise
7 Termination Agreement. (Ct. Rec. 157 at 10.) The court need not address
8 this claim because it is moot. In the court's order granting summary
9 judgment in behalf of Defendant, the court found that the Franchise
10 Termination Agreement expressly prohibited Rozmus from selling his
11 franchise rights if he was in default. (Ct. Rec. 155 at 28.) Since it
12 is undisputed that Rozmus was in default of the Franchise Termination
13 Agreement at the time of the alleged territory transfer application,
14 supra, Rozmus was contractually prohibited from transferring any
15 franchise rights he may have had at that time. Since Rozmus was
16 contractually prohibited from transferring the franchise at the time of
17 the alleged transfer application, Stanley Steemer could not have breached
18 an implied covenant of good faith and fair dealing because it did not
19 process the transfer application in a timely manner. Therefore, any
20 factual dispute regarding Stanley Steemer's basis for not processing the
21 transfer application is not material and therefore cannot preclude
22 summary judgment.

23 **Conclusion**

24 For the foregoing reasons, the court concludes that it did not
25 commit clear error in granting partial summary judgment in behalf of
26 defendant. Accordingly,

DATED this 10th day of September, 2010.

LONNY R. SUKO
 CHIEF UNITED STATES DISTRICT JUDGE